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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DB NPI CENTURY CITY, LLC, Plaintiff and Appellant, v. LEGENDARY INVESTORS GROUP NO. 1, LLC, et al., Defendants, Cross-complainants and Appellants; T.D. SERVICE COMPANY OF ARIZONA, Defendant and Respondent.	B271089, B277203 (Los Angeles County Super. Ct. No. BC494921)

CONSOLIDATED APPEALS from a judgment and postjudgment orders of the Superior Court of Los Angeles County, Michelle R. Rosenblatt and David Sotelo, Judges. Appeal No. B271089, affirmed in part and reversed in part with directions. Appeal No. B277203, affirmed.

Zimmerman, Axelrad, Meyer, Stern & Wise, Brian W. Zimmerman, and Nicholas Reisch; and Ernesto F. Aldover for Plaintiff and Appellant.

The Soni Law Firm, M. Danton Richardson and Leo E. Lundberg, Jr. for Defendants, Cross-complainants, and Appellants Legendary Investors Group No. 1, LLC and Legendary Century City, LLC.

The Dreyfuss Firm, Lawrence J. Dreyfuss, for Defendant and Respondent T.D. Service Company.

INTRODUCTION

DB NPI Century City, LLC (DB NPI) initiated this action in 2012 to cancel a deed of trust and obtain damages. Named defendants were Legendary Investors Group No. 1 (LIG), Legendary Century City, LLC (LCC), and T.D. Service Company of Arizona (T.D.).[1] Legendary cross-complained for damages against DB NPI.

DB NPI's complaint was resolved piecemeal. T.D.'s demurrer was sustained without leave to amend. DB NPI prevailed in a court trial against Legendary on one cause of action, but Legendary was granted judgment on the pleadings as to several others. Legendary's cross-complaint was tried to a jury; DB NPI prevailed.

After the entry of judgment, every party was awarded contractual attorney fees pursuant to Civil Code section 1717. As between DB NPI and Legendary, the trial court determined there was no prevailing party and ordered both sides to bear their own costs.

These consolidated appeals present multiple issues. In the first appeal, we resolve DB NPI's challenges with the following holdings: Prevailing party T.D. is entitled to contractual attorney fees as a matter of law pursuant to the deed of trust; LIG is entitled to judgment on the pleadings, but not for the reasons given by the trial court; the trial court failed to exercise its discretion as to one aspect of the contractual attorney fee award to LIG, and that error was prejudicial.

Turning to LIG's issues, we hold DB NPI is entitled as a matter of law to the settlement proceeds from an earlier lawsuit; DB NPI is entitled to contractual attorney fees as the prevailing party on its declaratory relief cause of action concerning the commercial security agreement; and LIG has

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[1] Consistent with the parties' practice, when we refer to LIG and LCC collectively, we will identify them as "Legendary."

forfeited its claims of error stemming from the jury trial on the cross-complaint.

In the second appeal, we hold that although the trial court abused its discretion in failing to designate a prevailing party, the error was harmless. The trial court acted well within its discretion when it ordered DB NPI and Legendary to bear their own costs.

FACTUAL BACKGROUND

In May 2007, East West Bank (EWB) approved a $9,356,000 loan to DB NPI for the construction of a condominium development. The loan was secured by a deed of trust on the real property, three guaranties, and a commercial security agreement.

A year later, as a result of a re-appraisal, EWB insisted on additional security. In June 2008, Drawbridge Special Opportunities Fund LP, an entity associated with DB NPI, obtained an irrevocable standby letter of credit from Wells Fargo Bank for the benefit of EWB in an amount not to exceed $841,280. The amended letter of credit was to be "used as security for credit facilities for [DB NPI]." Pursuant to its terms, Wells Fargo agreed to honor partial or multiple draws that were accompanied by the following representation: "We hereby claim (insert claim amount) under your irrevocable standby letter of credit number . . . . The amount claimed by us represents and covers the unpaid indebtedness including principal, interest and all charges and expenses incurred due to [EWB] arising from the granting of banking facilities to Drawbridge Special Opportunities Fund LP . . . ."

DB NPI defaulted on the loan in 2009. EWB submitted a request with the required language to Wells Fargo Bank and received the entire $841,280 on the letter of credit.

EWB then sold the defaulted loan to LIG. On June 25, 2009, LIG accepted an assignment of the DB NPI loan documents, as well as "[a]ll other instruments and agreements executed in connection with any of the foregoing in or under which [EWB] has any right, title or interest." At some point, LIG assigned the note, deed of trust, and guaranties to LLC, a wholly owned subsidiary. T.D., as substitute trustee under the deed of trust, foreclosed on

November 12, 2009. LCC, described as the grantee under the deed of trust and "foreclosing [b]eneficiary," acquired the property with a credit bid of slightly more than $2 million, approximately one-third of the outstanding DB NPI loan balance.[2]

PROCEDURAL BACKGROUND

The foreclosure set the stage for almost a decade of litigation:

I. First Lawsuit – *EWB* Action

DB NPI filed the first lawsuit on November 9, 2009, three days before the scheduled foreclosure (*DB NPI Century City, LLC v. Legendary Investors Group No. 1, LLC, et al.* (Super. Ct. L.A. County, 2009, No. 425405) (*EWB* action). The verified complaint named EWB, Legendary, and T.D. as defendants. DB NPI sought an injunction to prevent foreclosure and also sued for damages.

DB NPI alleged EWB engaged in fraudulent conduct that resulted in DB NPI's losing the real property. As against Legendary and T.D., DB NPI alleged EWB's decision to draw on the $841,280 letter of credit satisfied the more than $6 million still owing on the construction loan and extinguished the right to exercise the power of sale and foreclose on the property.

DB NPI noticed an ex parte hearing to enjoin the foreclosure, but took it off calendar. The foreclosure proceeded as scheduled on November 12, 2009. Within two months, DB NPI voluntarily dismissed Legendary and T.D. from the *EWB* action, without prejudice.

DB NPI's third amended complaint, naming only EWB, was filed in early 2012. The pleading included causes of action for negligence, breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. DB NPI and EWB settled the *EWB* action in July 2012. EWB did not admit any liability, but paid DB NPI $2 million.

Claiming the settlement proceeds constituted collateral under the commercial security agreement, LIG immediately demanded the $2 million.

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[2] DB NPI alleged the assignment from LIG to LCC did not occur until after the foreclosure and, consequently, LCC was not a beneficiary entitled to make a credit bid.

DB NPI's attorney interpleaded the settlement funds into the United States District Court, Texas Southern District, in Houston, Texas. By order dated May 23, 2011, the federal court stayed the interpleader action "pending the conclusion of the California action."

II. Second Lawsuit – *LIG* Action

In mid-2010, LIG (but not LCC) sued DB NPI and the guarantors, seeking to recover the loan deficiency (*Legendary Investors Group No. 1, LLC v. DBNPI, etc., et al.* (Super. Ct. L.A. County, 2010, No. 435774) (*LIG* action). DB NPI cross-complained, again asserting Legendary's draw on the letter of credit satisfied the much larger debt and extinguished any right to foreclose on the real property. LIG voluntarily dismissed DB NPI from the action without prejudice; DB NPI's cross-complaint reasserting the letter of credit issue was dismissed as well.

The guarantors prevailed at trial. The jury found LCC did not retransfer an interest in the guaranties to LIG,[3] and the trial court concluded LIG had no standing to sue the guarantors.

The *LIG* action generated multiple writ petitions and appeals. We summarily denied three writ petitions and issued four appellate decisions, including *Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407 (*Legendary II*).[4]

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[3] See footnote 2.

[4] Three opinions were unpublished: *Legendary Investors Group No. 1, LLC v. DB NPI Century City, LLC* (Aug. 21, 2013, B244646); *Legendary Investors Group No. 1, LLC v. Niemann* (Oct. 9, 2018, B281915, B283352); and *Legendary Investors Group No. 1, LLC v. Niemann* (January 16, 2019, B284736).

III. Current Action

DB NPI initiated this litigation against Legendary and T.D. on November 9, 2012.[5] This date was just shy of the third anniversary of the nonjudicial foreclosure and approximately four months after DB NPI settled the *EWB* action. Legendary cross-complained against DB NPI.

DB NPI's operative pleading was the first amended complaint. DB NPI sued for declaratory relief and damages based on wrongful foreclosure, slander of title, and trespass.[6]

T.D., named as a defendant in all the causes of action except trespass, demurred. The trial court sustained T.D.'s demurrer without leave to amend, and judgment was entered in T.D.'s favor.

After several unsuccessful motions (and writ petitions to this court) to dismiss DB NPI's wrongful foreclosure allegations, Legendary moved for judgment on the pleadings. The trial court agreed with Legendary that Commercial Code section 5115, the one-year statute of limitations applicable to letters of credit, barred DB NPI's wrongful foreclosure causes of action. In a bench trial on DB NPI's declaratory relief cause of action to retain the $2 million in *EWB* action settlement proceeds, the trial court determined the commercial security agreement did not give LIG any right to receive the money.

Legendary's operative pleading was the second amended cross-complaint. Four causes of action (slander of title, right to setoff, unjust

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[5] This lawsuit was filed while the *LIG* action was still pending. The two matters were deemed related and ordered to be heard in the same department.

[6] DB NPI voluntarily dismissed four causes of action (conspiracy to wrongfully foreclose, aiding and abetting a wrongful foreclosure, conspiracy to slander title, and aiding and abetting slander of title). The trial court dispatched another (quiet title) via Legendary's motion for summary adjudication of issues. These causes of action are not implicated in either the appeal or cross-appeal and are not discussed further.

enrichment, and quantum meruit) were disposed of before trial.[7] The remaining causes of action (breach of an oral agreement, misrepresentation, and fraud) all concerned Legendary's claim that DB NPI agreed not to contest the foreclosure and not to bring suit against Legendary once the foreclosure was accomplished. Legendary sought general and punitive damages. After prevailing on DB NPI's quiet title and wrongful foreclosure claims, Legendary tried its cross-complaint to a jury. Legendary lost. Legendary's motions for judgment notwithstanding the verdict and for a new trial were denied.

Interim judgments were entered at each stage of the proceedings, and the trial court entertained motions for attorney fees. The trial court determined all parties prevailed on certain contracts and were entitled to contractual attorney fees pursuant to Civil Code section 1717. T.D., as the prevailing party on DB NPI's complaint, was awarded the $43,505 in attorney fees against DB NPI, based on the attorney fees provision in the DB NPI deed of trust. Legendary was ordered to pay DB NPI, the prevailing party on the declaratory relief cause of action to retain the *EWB* action settlement proceeds, $403,293 in attorney fees, based on the attorney fees provision in the commercial security agreement. LIG prevailed in its defense against DB NPI's quiet title and wrongful foreclosure claims, and it sought $2,703,403.50 in attorney fees under the deed of trust. After considering DB NPI's written opposition and conducting a hearing, the trial court awarded LIG $2,435,315.50 in attorney fees. (Civ. Code, § 1717.)

The final judgment was entered May 18, 2016. Thereafter, DB NPI and Legendary filed memoranda of costs; each seeking prevailing party costs. The trial court determined neither party prevailed; in the exercise of its

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[7] Legendary's notice of appeal included a challenge to the summary adjudication of issues in DB NPI's favor on the slander of title cause of action, but Legendary failed to brief the point. It has been forfeited.

discretion, it disallowed costs to both parties.[8] (Code Civ. Proc., § 1032, subd. (a)(4).)

IV. Notices of Appeal

This lawsuit generated seven notices of appeal. DB NPI filed three notices in case No. B271089 to contest portions of the judgment and the postjudgment orders awarding contractual attorneys fees to T.D. and Legendary. Legendary also filed three notices of appeal under case No. B271089. One challenged portions of the judgment and another, the award of contractual attorneys fees to DB NPI. Legendary denominated the third as a "notice of cross-appeal" to challenge the trial court's earlier orders overruling its demurrer and denying its motion for summary adjudication of issues as to the wrongful foreclosure causes of action. These orders were not directly appealable when made and, as Legendary prevailed on the wrongful foreclosure causes of action in the trial court, are not appealable now. Nor do they qualify for review under the guise of a protective cross-appeal. (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 306-307.)

Legendary did not, however, notice an appeal from the trial court's decision to reduce attorney fees assessed against DB NPI or from the denial of the motions for judgment notwithstanding the verdict or new trial.

Although the Legendary notices of appeal in case No. B271089 were filed in the names of both LIG and LCC, only issues pertaining to LIG have been briefed. Accordingly, LCC forfeited all issues on that appeal. (*Multani v. Knight* (2018) 23 Cal.App.5th 837, 853, fn. 12; *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

Case No. B277203 is Legendary's appeal from the postjudgment order denying it prevailing party costs. The issue briefed here is on behalf of both LIG and LCC.

On our own motion, this court ordered the appeals consolidated for the purposes of oral argument and decision.

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[8] The trial judge was the Honorable Michelle R. Rosenblatt. The Honorable David Sotelo heard and ruled on the postjudgment motions for prevailing party costs.

DISCUSSION

I. Appeal, Case No. B271089

A. *Governing Principles*

We never presume error by the trial court. (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1161.) Appellants first must demonstrate the trial court erred and then establish prejudice as a result of the error. (*Widson v International Harvester Co.* (1984) 153 Cal.App.3d 45, 53.)

An appellant satisfies this burden when it presents "legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655 (*Keyes*).) To this end, rule 8.204(a)(1)(C) of the California Rules of Court specifies that appellate briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Compliance with this rule is essential in cases like this one with lengthy and complex records.[9] (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.)

Appellate review, even when de novo, does not require us to "scour the record" for the benefit of any party. (*Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 527, fn. 3.) Nor are we obligated "to discuss or consider points which are not argued or which are not supported by citation to authorities or the record." (*MST Farms v. C.G. 1464* (1988) 204 Cal.App.3d 304, 306.) An appellant who fails "to cite accurately to the record forfeits the issue or argument on appeal that is presented without the record reference." (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 589 (*Alki*).) "In addition, citing cases without any discussion of their application to the present case results in forfeiture. [Citations.] We are not required to examine undeveloped claims or to supply arguments for the litigants[;] . . . it is not the court's function to serve as the

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[9] The record in these consolidated appeals includes 50 volumes of clerk's transcripts, 11 volumes of reporter's transcripts, and more than 800 pages in appendices. At our request, the parties transferred almost 400 pages of exhibits to this court.

appellant's backup counsel." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*).)

B. *Issues Raised by DB NPI*

1. Award of Contractual Attorney Fees to T.D.

In this section, we reject DB NPI's contention that T.D. was not sued """on a contract""" and cannot be awarded contractual attorney fees award as the prevailing party. This issue presents a question of law we review de novo.[10] (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 821 (*Brown Bark*).)

a. *Background*

DB NPI's first amended complaint included the following allegations against T.D.: EWB's draw on the letter of credit extinguished DB NPI's debt under the promissory note, and the deed of trust should have been reconveyed. Instead, EWB sold the loan and assigned its interest in the various loan documents to LIG, which substituted T.D. as the new trustee. T.D. exercised the power of sale in the deed of trust and foreclosed on the property. Even though T.D. knew LIG was the sole beneficiary, it permitted LCC to acquire the property via a credit bid. On LIG's instructions after the nonjudicial foreclosure, T.D. backdated an assignment of the deed of trust from LIG to LCC so that it appeared LCC was the true beneficiary at the time of the foreclosure.

T.D.'s demurrer was sustained without leave to amend, and a judgment of dismissal entered. Because the deed of trust expressly gave it "'all of the rights and duties of Lender,'" T.D. sought attorney fees pursuant to Civil Code section 1717 based on the attorney fees' provision in the deed of trust.[11] DB NPI opposed the motion. Citing *Santisas v. Goodin* (1998) 17 Cal.4th 599

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[10] DB NPI does not challenge the amount of the attorney fees awarded to T.D.

[11] That provision provides in pertinent part, "If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. . . ."

(*Santisas*), DB NPI argued its lawsuit sought declaratory relief and damages based on tortious and wrongful conduct, so Civil Code section 1717 was not applicable. The trial court disagreed. Relying on *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316 (*Kachlon*), it awarded T.D. contractual attorney fees in the requested amount, $43,505.

b. *Analysis*

DB NPI primarily relies on *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295 (*Leach*) to argue that, as a matter of law, T.D is not entitled to contractual attorney fees. The plaintiff in *Leach* was a beneficiary under her mother's trust; the principal trust asset was the mother's home. The trustee, who was plaintiff's brother, borrowed money on several occasions, securing each loan with a deed of trust on the real property owned by the trust. (*Id.* at p. 1298-1300.) When the brother defaulted on the loans and one of the lienholders foreclosed, Leach sued her brother and the trustees and beneficiaries under the deeds of trust to clear title to the real property.

Leach's brother failed to appear in the action, but the other defendants prevailed. (*Leach*, *supra*, 185 Cal.App.3d at p. 1300.) They sought attorney fees pursuant to the promissory note and the deed of trust signed by Leach's brother. The trial court denied the request, and the Court of Appeal affirmed: "The note and deed of trust were executed by [the plaintiff's brother], not [the plaintiff]. As a plaintiff who was not a signatory to these contracts, Leach would have no independent right to recover fees under the attorney's fees clauses contained in them. Under the mutuality of remedy theory of section 1717, the [prevailing defendants] may not recover fees from Leach." (*Leach, supra,* at p. 1307.)

Here, of course, DB NPI is the signatory on the promissory note and deed of trust. *Leach*, *supra,* 185 Cal.App.3d 1295 offers no support for DB NPI's arguments.

DB NPI also cites *Santisas, supra,* 17 Cal.4th at page 615, to argue that Civil Code section 1717 "is inapplicable to a defendant when the plaintiff has not asserted any claims that sound in contract." Preliminarily, we caution that "'language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.'" (*Kinsman v. Unocal Corp*. (2005) 37 Cal.4th

659, 680.) The "proposition" considered in *Santisas* was whether Civil Code section 1717, subdivision (b)(2) barred the defendants from recovering attorney fees after the plaintiff's voluntary pretrial dismissal of "an action asserting both tort and contract claims, all of which [arose] from a real estate sales contract containing a broadly worded attorney fee provision."[12] (*Santisas, supra,* 17 Cal.4th at p. 602.)

Noting "[t]his claim sounds in contract, not tort, and is therefore an 'action on a contract' within the meaning of section 1717" (*Santisas*, *supra*, 17 Cal.4th at p. 615), the *Santisas* majority concluded "that contractual attorney fee provisions are generally enforceable in voluntary pretrial dismissal cases except as barred by section 1717. Applying this rule to the facts presented here, we further conclude that the seller defendants are entitled under the attorney fee provision of the purchase agreement to recover as costs the amount they incurred in attorney fees to defend the tort claims asserted against them in this action, and that section 1717 does not bar recovery of these fees." (*Id.* at p. 622, fn. omitted.)

DB NPI did not voluntarily dismiss T.D. before trial. Rather, T.D. prevailed in its defense against tort and equitable causes of actions. *Santisas* does not support DB NPI's position.

Moreover, the question is not so much whether causes of action "sound in contract" as whether they are "'on a contract.'" "California courts construe the term 'on a contract' liberally. "'As long as the action 'involve[s]' a contract it is "'on [the] contract'" within the meaning of section 1717.'"" (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979-980.) As *Turner* recognized, Civil Code section 1717 applies whether the action seeks to avoid or enforce a contract and whether attorney fees are incurred to prosecute or defend. (*Id.* at p. 980.) In short, "[a]ny action that is based on a contract is an action on that contract regardless of the relief sought." (*Brown Bark, supra,* 219 Cal.App.4th at p. 821.)

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[12] Civil Code section 1717, subdivision (b)(2) provides, "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

Accordingly, our analysis begins and ends with *Kachlon, supra,* 168 Cal.App.4th 316.[13] The *Kachlon* facts were complicated, but the plaintiffs' core allegations were similar to those in DB NPI's first amended complaint. The *Kachlon* plaintiffs sought declaratory and equitable relief on a wrongful foreclosure theory, asserting "the promissory note must be cancelled because it had been paid in full, and that the deed of trust must be reconveyed because the foreclosure violated the terms of the deed of trust." (*Kachlon, supra,* 168 Cal.App.4th at pp. 347-348.) The plaintiffs prevailed and were awarded contractual attorney fees jointly and severally against the defendant beneficiaries and substituted trustee.

This court affirmed. We held the wrongful foreclosure allegations were "'based upon an agreement [and] are "on the contract" within the meaning of Civil Code section 1717.'" (*Kachlon, supra,* 168 Cal.App.4th at p. 348.) Additionally, although equitable claims frequently are tort-based, wrongful foreclosure is essentially contractual in nature as it stems from an alleged violation of the terms of a deed of trust and also constitutes an action on the contract, triggering a Civil Code section 1717 attorney fees' award to the prevailing party. (*Ibid.*; see also *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 34, 50 [demurrer to wrongful foreclosure action sustained without leave to amend, entitling substituted trustee entitled to contractual attorney fees; the plaintiff's arguments concerning lack of privity and absence of any contract causes of action were rejected].)

The *Kachlon* analysis applies here. The duties of a trustee initiating a nonjudicial foreclosure "are exclusively defined by the deed of trust and the governing statutes." (*Kachlon, supra,* 168 Cal.App.4th at p. 335.) Like the allegations in *Kachlon*, DB NPI's wrongful foreclosure claims were based on DB NPI's contractual obligations under the deed of trust, entitling the prevailing party to contractual attorney fees. The coexistence of statutory duties does not diminish or negate those imposed by contract. The trial court properly awarded T.D. attorney fees pursuant to Civil Code section 1717.

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[13] Despite the trial court's reliance on *Kachlon, supra,* 168 Cal.App.4th 316 to award attorney fees to T.D. and T.D.'s discussion of the decision in its brief, DB NPI did not cite it, much less attempt to distinguish it, in its briefs.

2. Wrongful Foreclosure Claims

DB NPI next contends the trial court erred in concluding Commercial Code section 5115, the one-year statute of limitations applicable to letters of credit, applied to the wrongful foreclosure causes of action. Although we agree the trial court's reliance on that code section was erroneous, our independent review of the record persuades us DB NPI has not, and cannot, state a wrongful foreclosure cause of action. For this reason, we agree judgment on the pleadings without leave to amend is proper.

a. *Standard of Review and Supplemental Briefing*

On appeal from the grant of a motion for judgment on the pleadings, we independently review the challenged pleading and determine whether a cause of action is stated. (*Eckler v. Neutrogena Corp.* (2015) 238 Cal.App.4th 433, 439.) Our review is not limited to the grounds raised by the defendant or relied upon by the trial court. We may affirm "'whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.)

We look for "'defects disclosed on the face of the pleadings or by matters that can be judicially noticed.'" (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064.) We assume "the truth of all properly pleaded facts but not contentions, deductions or conclusions of fact or law. (*State of California ex rel. Metz v. Farmers Group, Inc.* (2007) 156 Cal.App.4th 1063, 1068.) We also assume the truth of all facts reasonably inferable from pleaded facts, facts in exhibits, and facts that are judicially noticed. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402.)

If a reviewing court determines a pleading fails to state facts sufficient to constitute a cause of action, the plaintiff has the burden to "'show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' . . . Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*).)

After briefing was complete, we invited DB NPI and LIG to present their views as to whether allegations in the first amended complaint fail to state facts sufficient to constitute causes of action for wrongful foreclosure

and, if so, should leave to amend be denied. (Gov. Code, § 68081.) We also asked these parties to address *Legendary II, supra,* 224 Cal.App.4th 1407. *Legendary II* was decided more than three years before the first brief in this action was filed. It includes a discussion and analysis of the very letter of credit at issue here, yet no party cited it in its briefs. We received supplemental briefing from DB NPI and LIG.[14]

Additionally, we solicited the parties' views as to "the propriety of taking judicial notice [of the letter of credit] and . . . the tenor of the matter to be noticed." (Evid. Code, § 455.) We have reviewed the responses to this invitation and are persuaded we are not limited to judicial notice, but may treat the letter of credit as an exhibit to the first amended complaint.

This litigation has been pending for more than six years. The letter of credit was received into evidence at trial without objection. Moreover, this is the third lawsuit to raise the same letter of credit issue. Neither the parties nor the judicial system will benefit if we ignore this document after all these years and all this litigation. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 487 (*Arntz*).) In any event, as we discuss, *post*, the letter of credit is significant more for what it omits than for what it includes.[15]

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[14] LIG also requested judicial notice of the brief filed by the guarantors of the DB NPI loan in appeal *Legendary II, supra,* 224 Cal.App.4th 1407. We deny the request. The brief does not add to our analysis of the wrongful foreclosure issue.

[15] DB NPI teeters on a slippery slope here. DB NPI contends we must accept as true language from the letter of credit that is reproduced in the first amended complaint because "under California law, the doctrine of estoppel by contract creates a conclusive presumption of the truth of facts recited in a written agreement." DB NPI urges a more restrictive rule for language that was not recited in the first amended complaint: "[T]he truth of statements contained in the [letter of credit] . . . are not subject to judicial notice if those matters are reasonably disputable."

b. *Background*

DB NPI's first amended complaint sought general and punitive damages and attorney fees for wrongful foreclosure. In support of this theory of recovery, DB NPI alleged as follows:

- "EWB refused to fully fund the Project, [so] DB NPI was compelled to provide a letter of credit" as additional security for the loan;
- "DB NPI agreed to provide the [letter of credit], in part, because on its face, it was never likely to be called upon;"
- the letter of credit included only one term: every draw was required to be accompanied by EWB's statement that "[t]he amount claimed by us represents and covers the unpaid indebtedness including principal, interest and all charges and expenses incurred due to East West Bank arising from the granting of banking facilities to [DB NPI]." (Emphasis omitted.)
- "[t]he effect of this language in the [letter of credit] is that a draw would be made under the LOC only if either a deficiency remained after EWB's foreclosure of its lien on the Property or, alternatively, if EWB elected to vacate its lien and instead to simply draw on the LOC. EWB specifically approved this formulation when it accepted the LOC and DB NPI relied on this formulation when it agreed to provide the LOC;"
- when EWB drew on the letter of credit, it "certified that the draw . . . would cover the unpaid indebtedness, which means that any debt owing by DB NPI to EWB was deemed satisfied in full;"
- "EWB admitted that all of the 'unpaid indebtedness including principal, interest and all charges and expenses incurred due to East West Bank arising from its granting of banking facilities to [DB NPI] . . . [¶] . . . were extinguished;"
- the trial judge in the *LIG* action "recently determined . . . the debt has been ***extinguished***."[16]

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[16] We disagreed with the trial court on this point in *Legendary II, supra,* 224 Cal.App.4th 1407. There, we held the guarantors' obligations under construction loan were not "'fully and finally paid and satisfied'" as a result of EWB's drawdown on the letter of credit. (*Id.* at p. 1414.) In reaching this conclusion, we observed, "Whether or not it contains a reference to an agreement between DB NPI and [EWB], the letter of credit does not lend

Faced with these allegations, LIG moved for judgment on the pleadings, arguing DB NPI's wrongful foreclosure causes of action were barred by Commercial Code section 5115, the one-year statute of limitations for any "action to enforce a right or obligation arising under" a letter of credit. The trial court agreed with Legendary and found Commercial Code section 5115 "broadly applies to any action to enforce a right or obligation . . . pertaining to letters of credit." The trial court concluded Legendary "failed to honor the terms of the LOC [when it failed] . . . to honor DB NPI's rights under the LOC" and foreclosed on the real property even though DB NPI's debt was extinguished once EWB drew down on the letter of credit.

c. *Analysis*

(1) Letter of Credit

Commercial Code section 5101 et seq. sets forth the law pertaining to letters of credit. The letter of credit law is expressly limited in scope, however, and applies only to "certain rights and obligations arising out of transactions involving letters of credit." (Com. Code, § 5103, subd. (a).) In particular, rights and obligations conferred by a letter of credit "are independent of the existence, performance, or nonperformance of a contract . . . out of which the letter of credit arises or which underlies it, including contracts . . . between the . . . applicant and the beneficiary." (Com. Code, § 5103, subd. (d); see also *California Bank & Trust v. Piedmont Operating Partnership, L.P.* (2013) 218 Cal.App.4th 1322, 1334 (*California Bank & Trust*).) Litigants seeking remedies pursuant to the letter of credit law (Com. Code, § 5111) must initiate their actions "within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later." (Com. Code, § 5115.)

Our Supreme Court has noted that "[a] letter of credit transaction involves at least three parties and three separate and independent relationships: (1) the relationship between the issuer and the beneficiary created by the letter of credit; (2) the relationship between the customer and the beneficiary created by a contract or promissory note, with the letter of credit securing the customer's obligations to the beneficiary under the

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itself to [the guarantors'] interpretation" that a drawdown on the letter of credit extinguished DB NPI's entire debt. (*Id.* at p. 1413.)

contract or note; and (3) the relationship between the customer and the issuer created by a separate contract under which the issuer agrees to issue the letter of credit for a fee and the customer agrees to reimburse the issuer for any amounts paid out under the letter of credit." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 239, fn. 3 (*Western Security Bank*).) Lawsuits involving the first and third relationships described above typically fall within the scope of California's letter of credit law (Com. Code, § 5103, subd. (a)) and must be brought within one year.

But this lawsuit implicates the second relationship—the one "between the customer and the beneficiary created by a contract or promissory note, with the letter of credit securing the customer's obligations to the beneficiary under the contract or note." (*Western Security Bank, supra,* 15 Cal.4th at p. 239, fn. 3.) Although DB NPI may have framed the dispute with LIG as "arising out of" a transaction involving a letter of credit (Com. Code, § 5103, subd. (a)), the rights and obligations it seeks to enforce are based on its loan obligations to EWB and are not within the scope of California's letter of credit law (Com. Code, § 5103, subd. (d)). Any remedies DB NPI may have against LIG must arise out of the construction loan agreement, promissory note, and deed of trust, not the letter of credit. LIG cannot rely on Commercial Code section 5115.

(2) Sufficiency of the Pleadings and Denial of Leave to Amend

The conclusion that the dispute between DB NPI and LIG does not arise out of a transaction involving the letter of credit is a double-edged sword for DB NPI. Just as the letter of credit cannot dictate a statute of limitations for this action, it cannot "memorialize" or amend a separate agreement between DB NPI and EWB.

The letter of credit does not reference any DB NPI loan documents or obligations to EWB. By law, the letter of credit is independent of the underlying loan documents. Nonetheless, DB NPI would ignore the independence principle and have this court hold the solitary "negotiated" term in the letter of credit−the presentment language—amends the underlying loan obligations to EWB. DB NPI goes so far as to assert that it should be permitted "to enforce EWB's promise and representations [in] the

letter of credit [as] being 'last monies' even in the absence of a written agreement."

DB NPI does not present a cogent or analytical argument to support this position, nor could it: "The essence of a letter of credit is the promise by [the issuer] . . . to pay money. The key to the uniqueness of a letter of credit and to its commercial vitality is that the promise by the issuer is independent of any underlying contracts." (*Pringle-Associated Mortg. Corp. v. Southern Nat'l. Bank* (5th Cir. 1978) 571 F.2d 871, 874.) The promise by the beneficiary vis-à-vis a letter of credit is to comply with the terms and conditions of the letter of credit itself. (*Mitsui Manufacturers Bank v. Texas Commerce Bank-Fort Worth* (1984) 159 Cal.App.3d 1051, 1055.)

A standby letter of credit does no more than secure a debtor's obligations pursuant to underlying agreements. (*California Bank & Trust, supra,* 218 Cal.App.4th at p. 1334.) Although a letter of credit may augment, i.e., reinforce or add to, the terms of underlying agreements (*id.* at p. 1349; Com. Code, § 5110, subd. (a)(2)), it can neither violate or alter those terms nor memorialize a separate oral agreement that would violate or alter terms in the underlying agreements. We have reviewed the entire letter of credit. As a matter of law, this standby letter of credit, whether or not it references any other agreements, does not support DB NPI's wrongful foreclosure claims. (See *Legendary II, supra*, 224 Cal.App.4th at p. 1413.)

Finding the letter of credit insufficient, we next independently examine the current allegations. If they do not state a cause of action, we must then decide whether leave to amend should be granted. The parties agree the three elements for a wrongful foreclosure cause of action are an (1) "illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust," (2) harm to the party attacking the sale, and (3) proof the debtor "tendered" the debt owing or was excused from doing so. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408-409.) To survive a judgment on the pleadings, DB NPI must "plead[] facts sufficient to establish *every element of that cause of action."* (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) As discussed, DB NPI may not rely on arguments and legal conclusions. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 523, fn. 2.)

An examination of the bulleted allegations demonstrates that DB NPI failed to allege facts sufficient to support the first and third elements of a wrongful foreclosure cause of action. DB NPI admittedly has not repaid the loan in full. The construction loan agreement, promissory note, deed of trust, and valid amendments to these documents establish the contractual relationship between DB NPI and EWB. (*Western Security Bank, supra,* 15 Cal.4th at p. 239, fn. 3.) Each of these documents provides terms for repayment of DB NPI's loan and requires amendments to be in writing and signed by the "parties to be charged or bound."[17]

To state a valid claim for wrongful foreclosure, DB NPI must allege facts to support allegations that EWB agreed to modify one or more of those documents. DB NPI's failure to do so renders the current pleading, which is supported only by contentions, arguments, legal conclusions, and misplaced reliance on the letter of credit, insufficient as a matter of law.

In arguing it should be given an opportunity to amend, DB NPI continues to focus on the letter of credit, rather than the underlying agreements. DB NPI does not present any new facts; instead, it suggests a new theory—wrongful foreclosure by estoppel. But a legal theory is no substitute for adequately pleaded facts. (*Rakestraw, supra,* 81 Cal.App.4th at pp. 43-44.) Six years into this litigation, DB NPI has yet to articulate what facts it might allege to state a cause of action for wrongful foreclosure. Leave to amend is denied.

3. Award of Contractual Attorney Fees to LIG

LIG was entitled to a contractual attorney fees award. DB NPI challenges the amount awarded, and we review that issue under the abuse of discretion standard. (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1016-1017 (*Apex*).) Here, we hold the trial court abused its discretion by including $906,868.60 in the award, without making an apportionment

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[17] The construction loan agreement and deed of trust are exhibits to the first amended complaint. The promissory note was not an exhibit to the first amended complaint, but it was a trial exhibit. It provides, "Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker, or endorser, shall be released from liability."

between Legendary's recoverable attorney fees to successfully defend against DB NPI's quiet title and wrongful foreclosure causes of action and Legendary's nonrecoverable attorney fees incurred in the failed defense against DB NPI's claim to the *EWB* action settlement proceeds and the jury trial loss on the cross-complaint.

a. *Background*

Legendary sought $2,703,403.50 in attorney fees for defending the DB NPI complaint and prosecuting the cross-complaint. In the trial court, DB NPI contested Legendary's right to receive $1,176,401.60 of that sum. The challenged charges were identified in five exhibits, A through E. The bulk of the challenged attorney fees were included in exhibit C, which listed approximately 350 billing entries and fees totaling $906,868.60. Exhibits A, B, D, and E identified a total of $269,533 in contested fees.

DB NPI contended the entries in exhibit C were "block-billed," with each description reflecting work undertaken on multiple tasks that included the wrongful foreclosure claims (for which attorney fees could be awarded) as well as the cross-complaint and/or DB NPI's claim to the *EWB* action settlement proceeds (for which Legendary was not entitled to attorney fees). DB NPI argued Legendary "deliberately chose" not to allocate attorney time between recoverable and nonrecoverable tasks and urged the trial court to deny all the exhibit C charges.

In opposition, Legendary took the position that an allocation was not necessary because the cross-complaint was entirely defensive in nature[18] and all issues were "inextricably intertwined" with the wrongful foreclosure claims. In the event the trial court disagreed with that assessment, Legendary's counsel asked at the hearing on the motion for attorney fees for

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[18] LIG reiterates this position on appeal and asserts the cross-complaint was brought only to ensure it retained ownership of the real property. We are not persuaded. The cross-complaint sought general and punitive damages, and Legendary proceeded with a jury trial on the cross-complaint even though it had already secured favorable rulings on DB NPI's causes of action for quiet title and wrongful foreclosure.

an opportunity to revise the attorney fees request to eliminate nonrecoverable attorney time.[19] The trial court took the matter under submission and advised counsel they would be able to submit additional information if the court determined it was necessary.

In a written ruling several weeks later, the trial court found the hourly rates, billed time, and staffing decisions on behalf of Legendary were "generally" reasonable, particularly in light of the complex issues and experience of counsel. However, the trial court expressly rejected Legendary's claims that it was "entitled to all of the fees incurred . . . up to the time of the [trial court's] ruling on its motion for judgment on the pleadings" and concluded Legendary's failed cross-complaint and unsuccessful defense of DB NPI's declaratory relief cause of action to retain the *EWB* action settlement proceeds were not "inextricably intertwined" with its successful defense of DB NPI's quiet title and wrongful foreclosure causes of action. The trial court determined LIG's attorney fees needed to be apportioned between recoverable and nonrecoverable tasks.

The trial court's written ruling addressed DB NPI's exhibits A, B, D, and E. With the exception of a specific entry of less than $2,000, the trial court credited DB NPI's opposition in those four exhibits and reduced the requested award by $268,088. The trial court's ruling did not mention exhibit C, Legendary's block billing, or Legendary's concession that it had not segregated billings for legal services to defend the quiet title and wrongful foreclosure claims from those incurred for legal services where Legendary was defeated, i.e., the Legendary cross-complaint and DB NPI's declaratory relief cause of action to retain the *EWB* action settlement proceeds.

b. *Analysis*

Trial courts have broad discretion to apportion attorney fees. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297.) We are "highly

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[19] "[Legendary's counsel]: Just one last thing, your Honor, on the motion for attorney's fees, if you reject our argument that matters were inextricably intertwined . . . [¶] . . . [¶] . . . I would ask leave to be able to—if your Honor wants us to segregate fees[—]to take another run at that . . . ."

deferential to the views of the trial court [and do not disturb the award unless we are persuaded] . . . """"it is clearly wrong."""""" (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777.) DB NPI has the burden "to establish that discretion was clearly abused and a miscarriage of justice resulted." (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505.) DB NPI satisfied this burden by demonstrating the trial court failed to exercise its discretion to apportion the attorney fees identified in exhibit C. (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515 (*Gray*) ["A trial court's failure to exercise discretion is itself an abuse of discretion"].)

The trial court's finding that the issues in this lawsuit were not inextricably intertwined has not been challenged on appeal. Moreover, Legendary was not the prevailing party on either its cross-complaint or DB NPI's declaratory relief cause of action to retain the *EWB* action settlement funds. Legendary was entitled to reasonable attorney fees necessarily incurred to defend the quiet title and wrongful foreclosure claims, but not for other aspects of this litigation.

LIG conceded in the trial court that it had not attempted to segregate attorney fees incurred to defend the wrongful foreclosure. This concession is supported by a cursory review of a number of random entries in exhibit C, which demonstrates block billing, i.e., the assignment of "a block of time to multiple tasks rather than itemizing the time spent on each task" (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010) and suggests some attorney fees may have been incurred to defend against DB NPI's declaratory relief cause of action concerning the *EWB* action settlement proceeds and to prosecute the unsuccessful cross-complaint.

Block billing might not have been a concern if the trial court determined all the issues in this litigation were inextricably intertwined. But the trial court reached a contrary conclusion. "[T]rial courts are granted discretion 'to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not.'" (*In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 695.) Trial courts do not have discretion to ignore block billing and award contractual attorney fees to a party for noncompensable work. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555 ["a court may not award fees

for legal work that is unrelated to a cause of action for which fees are authorized"].)

Accordingly, we reduce the attorney fees awarded to LIG by $906,868.60, leaving an award of $1,528,446.90. Legendary may accept the attorney fees award of $1,528,446.90 or, upon issuance of the remittitur, it may ask the trial court to revisit exhibit C.

We express no view as to how the trial court is to proceed on remand. It is within the trial court's discretion to permit Legendary to revise the billing entries listed on DB NPI's exhibit C. We emphasize only that a remand is for this limited purpose and is not an invitation for DB NPI to amend exhibit C or for any party to revisit other aspects of the attorney fees' ruling.

B. *Issues Raised by LIG*

1. EWB Settlement Proceeds

The question presented in this section is whether the $2 million settlement in the *EWB* action constitutes "collateral" to which LIG is entitled pursuant to the DB NPI commercial security agreement (CSA). Our review of this issue is de novo. The answer is no.

a. *Background*

The CSA was one of several documents in the DB NPI loan packet. Pursuant to the CSA, DB NPI pledged certain collateral, "whether now owned or hereafter acquired, whether now existing or hereafter arising and wherever located" as additional security for the EWB loan. The CSA defined the word "collateral" and included a number of examples, *inter alia*, "General Intangibles," "all proceeds . . . (including insurance, general intangibles and other accounts proceeds)," and "sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment[,] settlement or other process." The CSA did not identify any then-existing "commercial tort claims" as collateral;[20] in fact, the CSA does not use the word "tort" at all.

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[20] "[A] claim arising in tort with respect to . . . [¶] . . . an organization" is a commercial tort claim. (Com Code, § 9102, subd. (a)(13.)

As soon as DB NPI settled the *EWB* action, LIG claimed the right to receive the settlement proceeds. LIG acknowledged a commercial tort claim is not a "general intangible" (Com. Code, § 9102, subd. (a)(42)), but reasoned that once the claim was settled and became an obligation to pay, i.e., a "payment intangible," it automatically fell into the "general intangible" category (Com. Code, § 9102, subd (a)(61)).

The parties tried this issue to the court. Although the *EWB* action included contract and tort claims, the trial court determined the gravamen of the lawsuit was DB NPI's commercial tort claim. The trial court also concluded the settlement between DB NPI and EWB "did not allocate the funds between the breach of contract and the commercial torts; nor did the Legendary [d]efendants seek" such an allocation in the court trial.[21] Relying on *Waltrip v. Kimberlin* (2008) 164 Cal.App.4th 517 (*Waltrip*), the trial court concluded as a matter of law that the *EWB* action settlement proceeds were not collateral to which LIG was entitled.

b. *Analysis*

Security agreements may identify existing commercial tort claims as collateral and may also include language that creates "a security interest in after-acquired collateral." (Com. Code, § 9204, subd. (a).) But the Legislature has decreed that an "after-acquired" collateral clause does not apply to future commercial tort claims. (Com. Code, § 9204, subd. (b)(2).)

EWB allegedly committed torts only after DB NPI signed the CSA. Because DB NPI's commercial tort claim was not pending when the CSA was signed, it was beyond the scope of the security agreement's after-acquired collateral clause. (Com. Code, § 9204, subd. (b)(2); *Waltrip, supra,* 164 Cal.App.4th at p. 528.) Comment 5 to Commercial Code section 9108 explains, "Under Section 9204, an after-acquired collateral clause in a security agreement will not reach future commercial tort claims."

LIG nonetheless insists Comment 15 to Commercial Code section 9109 compels a different result. The first paragraph of Comment 15 provides "that once a claim arising in tort has been settled and reduced to a contractual

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[21] LIG does not challenge these findings on appeal.

obligation to pay (as in, but not limited to, a structured settlement) the right to payment becomes a payment intangible and ceases to be a claim arising in tort." But the second paragraph of Comment 15 tempers this statement with "two special rules governing creation of a security interest in tort claims. First, a description of collateral in a security agreement as 'all tort claims' is insufficient to meet the requirement for attachment. [Citation to Com. Code, § 9108, subd. (e).] Second, no security interest attaches under an after-acquired property clause to a tort claim. [Citation to Com. Code, § 9204, subd. (b).]"

At most, Comment 15 confirms that a pending commercial tort claim, if adequately described in a security agreement, may constitute collateral. (Com. Code, §§ 9108, 9109.) If a pending commercial tort claim qualifies as collateral, then the settlement proceeds from that claim will also be collateral. Here, however, the commercial tort claim itself was never collateral, and the settlement proceeds are not either.[22] Comment 15 does not—nor could it—alter the Legislature's mandate that after-acquired property clauses do not create security interests in future commercial tort claims. (Com. Code, § 9204, subd. (b)(2); *Waltrip, supra,* 164 Cal.App.4th at p. 528.)

The wisdom of this statutory prohibition is obvious. Take, for example, a lender that requires its borrower to sign a security agreement with an after-acquired collateral clause. The borrower falls behind on the loan and does not appear to have sufficient collateral to repay the outstanding balance. The lender, who is insured, then commits a commercial tort. The lender assigns the security agreement to a strawman and settles the commercial tort claim, with its insurer making the payment. Nothing but Commercial Code section 9204, subdivision (b)(2) would prevent the lender from deeming the settlement proceeds as payment/general intangibles and keeping them.

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[22] "Proceeds" is a defined term in the Commercial Code. (Com. Code, § 9102, subd. (a)(64).) "Proceeds" arise out of, or are acquired, collected, or derived from, collateral. For the purposes of a security agreement, proceeds have no existence independent of collateral, i.e., if there is no collateral, there can be no proceeds.

2. Jury Verdict on Cross-Claims

A jury rejected LIG's cross-complaint for damages against DB NPI, and LIG contends the trial court erred in three respects. LIG has forfeited each issue, however.

a. *Evidentiary Rulings – Exhibits*

LIG faults the trial court for imposing "procedures which precluded LIG from properly and effectively presenting its case (e.g., refusing to allow Exhibits to be admitted and shown to the [j]ury during . . . witnesses' testimony), improperly excluding critical evidence (emails of [a nonparty], even though [that nonparty] controlled 88% of DB NPI . . .)." LIG's specific contentions are that the trial court refused to permit the jurors to view any exhibit until it had been received into evidence; failed to rule on objections to this protocol; erroneously excluded exhibits 21 and 86-94, inclusive; and engendered such confusion that LIG's trial counsel either forgot to ask that certain exhibits be received into evidence or determined it would be futile to seek their admission.

LIG offers no insight into precisely what the complained-of procedures entailed. We assume the trial court outlined them verbally on the record, in written court minutes, or by signed order. But LIG has not advised this court where in the record, by volume and page number, to find the procedures or LIG's objections, if any. (Cal. Rules of Court, rule 8.204(a)(1)(C).) To preserve this issue for appeal, LIG was required to provide accurate citations to the clerk's and reporter's transcripts. (*Alki, supra,* 4 Cal.App.5th at p. 589.) LIG failed to do so, and the issue is forfeited.

Insofar as exhibit 21 is concerned, LIG concedes it never offered that document into evidence. LIG made a similar concession as to exhibits 86 through 94, inclusive.[23] A party cannot fault the trial court for "fail[ing] to do something which it was not asked to do" (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603), or for admitting evidence to which no objection was

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[23] We note in passing that the record indicates LIG did offer exhibit 90 into evidence, but the trial court refused to admit it based on hearsay, lack of foundation, and improper rebuttal. That said, after LIG's counsel advised the parties "stipulated to the admissibility of all the [EWB] documents," the trial court indicated it would reconsider its ruling if a stipulation were produced.

made (*Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, 1261).

LIG seeks to avoid the general rule of forfeiture by arguing, "LIG's counsel believed that it would have been futile to offer more such exhibits into evidence." In support of this contention LIG repeatedly cites to the declaration of trial counsel M. Danton Richardson. This declaration was submitted in support of LIG's motions for judgment notwithstanding the verdict and for new trial; it is not a suitable substitute for citations to the record.

Although made under penalty of perjury, the Richardson declaration is couched in conclusory terms and weighted with opinion and argument. Paragraph 3, for example, reads as follows: "Not being permitted to show the exhibits to the jury was prejudicial to Legendary, because this case was primarily based on the testimony of witnesses regarding the formation of an oral contract and representations of the witnesses regarding same and circumstantial evidence in the form of such exhibits. The credibility of witnesses was an essential part of the [j]ury's deliberations."

Like points and authorities, a declaration that was not received into evidence during trial and contains argument and the impressions and opinions of a party's attorney, instead of evidence, "is not appropriate support for factual assertions in a brief." (*Alki, supra,* 4 Cal.App.5th at p. 590.) LIG has forfeited this claim.

b. *Ernesto Aldover Testimony*

LIG next argues the trial court erroneously permitted Ernesto Aldover, one of DB NPI's trial attorneys, to testify even though DB NPI had not identified him as a witness and refused to produce him for a pretrial deposition. On appeal, LIG claims the trial court's ruling constituted prejudicial surprise.

There is no record that LIG objected. Without an objection, the issue is not preserved for appeal. Additionally, although LIG's brief again cites to the Richardson declaration, there are no citations to the record. (*Alki, supra,* 4 Cal.App.5th at p. 590.)

LIG does cite two appellate decisions, but neither is helpful. In *Hata v. Los Angeles County Harbor/UCLA Medical Center (*1995) 31 Cal.App.4th

1791, 1807, the Court of Appeal reversed an order granting a new trial because the record did not support a finding of surprise. The result was the same in *Wade v. De Bernardi* (1970) 4 Cal.App.3d 967, 972, where the appellants made no showing they would fare better on retrial if the evidence were excluded. The holdings in these cases are seemingly at odds with LIG's position here, but LIG offers no analysis to persuade us they should apply. Instead, LIG simply concludes the trial court committed prejudicial error. Citing cases without analyzing their applicability to the pending issues results in forfeiture. (*Allen, supra,* 234 Cal.App.4th at p. 52.)

c. *Special Verdict Form*

The success of LIG's cross-complaint depended on the existence of an oral agreement by DB NPI not to sue for wrongful foreclosure.[24] In a skeletal and conclusory argument, LIG contends the trial court prejudicially erred by including "the issue of indefiniteness of [this] oral contract" on the special verdict form. LIG does not restate the challenged jury question in its briefs and fails to provide a citation in the record for the special verdict form itself. We are told only that the trial court overruled its objection and presented the jury with a special verdict form "in which the very first question was on this issue which was not raised by the pleadings or litigated by the parties."

LIG also fails to present a legal argument in support of its claim. As the party urging the enforcement of an oral agreement, LIG had the burden to establish its terms. (*Ladas, supra*, 19 Cal.App.4th at p. 770; see also CACI No. 302 ["[t]o prove that a contract was created, [the plaintiff] must prove all of the following: [¶] 1. That the contract terms were clear enough that the parties could understand what each was required to do"].) LIG does not address this fundamental precept of contract law.

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[24] LIG had the burden to establish the "'offer [was] sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain.'" (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 (*Ladas*); see also CACI No. 302 ["[t]o prove that a contract was created, [the plaintiff] must prove all of the following: [¶] 1. That the contract terms were clear enough that the parties could understand what each was required to do"].)

LIG's briefs are bereft of record citations and cogent analysis. It is not our role "to examine undeveloped claims or to supply arguments for the litigants." (*Allen, supra,* 234 Cal.App.4th at p. 52.) This issue, too, is forfeited.

3. Award of Contractual Attorney Fees to DB NPI

Next, LIG challenges the trial court's award of contractual attorney fees in the sum of $403,293 to DB NPI. LIG contends DB NPI was not entitled to any fees as a matter of law and, additionally, the award was excessive. We review the first issue de novo (*Brown Bark, supra,* 219 Cal.App.4th at p. 821); LIG has forfeited the second.

a. *Background*

The CSA, upon which LIG based its claim to the *EWB* action settlement proceeds, includes an attorney fees provision that entitles the prevailing party to attorney fees "incurred in connection with the enforcement of this Agreement." As the prevailing party on this discrete contract, DB NPI sought $994,152 in attorney fees. LIG opposed the motion, arguing all the original loan documents, including the CSA, must be construed together to provide for only one attorney fee award, which it obtained. Relying on *Arntz, supra,* 47 Cal.App.4th 464, the trial court disagreed and awarded DB NPI contractual attorney fees in the reduced amount of $403,293.

b. *Analysis*

The law in this area is clear: "[T]here may only be one prevailing party entitled to attorney fees on a given contract in a given lawsuit." (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 520.) But "[w]hen an action involves multiple, independent contracts, each of which provides for attorney fees, the prevailing party for purposes of Civil Code section 1717 must be determined as to each contract regardless of who prevails in the overall action. [Citation.] The fact that a party 'obtained a higher net recovery in the lawsuit is irrelevant to the determination of which party prevailed on any particular action on a contract.'" (*Arntz, supra,* 47 Cal.App.4th at p. 491.) As the trial court recognized, *Arntz* is applicable here.

DB NPI and LIG were parties to multiple contracts, each with an attorney fees provision. LIG prevailed on the wrongful foreclosure issue involving the deed of trust; DB NPI prevailed on the *EWB* action settlement

issue involving the CSA. The parties prevailed on separate contracts and were each entitled to attorney fees pursuant to the relevant agreement.

LIG's reliance on Civil Code section 1642 ("[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together") is misplaced. LIG fails to cite one appellate decision where Civil Code section 1642 was applied to deny attorney fees to a party prevailing on a separate contract. The authorities LIG does cite, however, suggest appellate courts will meld multiple documents executed contemporaneously in order to award attorney fees to a prevailing party, even though one or more of the documents does not include its own attorney fees provision. (See, e.g., *Nevin v. Salk* (1975) 45 Cal.App.3d 331, 338 [real property sales agreement did not include an attorney fees clause, but the incorporated promissory note and security instruments did; "the trial court properly concluded all the instruments formed a single contract" and properly awarded attorney fees to prevailing party]; *Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 325-326 [although guaranty agreements were not enforceable, "the rule that several contracts between the same parties, relating to and made as part of the same transaction, should be taken together" meant prevailing guarantors were awarded attorney fees pursuant to clauses in the promissory note and deed of trust].)

As for LIG's argument that the trial court awarded excessive attorney fees to DB NPI, LIG again fails to provide sufficient record references and citations to permit review. LIG, for example, does not provide a record reference to the trial court's ruling. The only pertinent citation in LIG's brief is to exhibit E of the declaration by LIG attorney Leo E. Lundberg, Jr. Exhibit E lists $80,844.50 in attorney fees that LIG concedes were related to the CSA; but there are no references to the attorney fees LIG claims were not so related or were excessive. Legal argument without citation to authorities or the record, including the challenged billing entries, does not provide this court with a basis to reverse the trial court's ruling. This issue, too, must be added to the forfeiture list.

II. Appeal No. B277203

A. *Background*

At the conclusion of the case, Legendary and DB NPI filed memoranda of costs, each asking to be declared the prevailing party. Legendary sought costs in the amount of $151,113.72. Both sides filed motions to tax costs. The trial court applied the discretionary provisions of Code of Civil Procedure section 1032, subdivision (a)(4), and issued a written ruling granting both motions to strike and ordering the parties to bear their own costs: "Under the circumstances, where each party obtained or retained something of value, there is no prevailing party for costs purposes."

Only Legendary appeals.[25] The standard of review is abuse of discretion. (*LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1123.)

B. *Analysis*

"[F]our categories of litigants . . . automatically qualify as prevailing parties[;] . . . '"the party with a net monetary recovery, . . . a defendant in whose favor a dismissal is entered, . . . a defendant where neither plaintiff nor defendant obtains any relief, and . . . a defendant as against those plaintiffs who do not recover any relief against that defendant." (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 737-738.) For a litigant falling within one or more of these categories, prevailing party status and an award of costs are automatic; the trial court has no discretion to rule otherwise. (*Id.* at p. 738.) For a litigant falling outside these categories, both the determination of prevailing party status and an award—or not—of costs is entirely within the trial court's discretion. (*Ibid.* ["'This prong of the statute thus calls for the trial court to exercise its discretion both in determining the prevailing party and in allowing, denying, or apportioning costs. It operates as an express statutory exception to the general rule that a prevailing party is entitled to costs as a matter of right"].)

Legendary does not fall within any of the four automatic, nondiscretionary categories. Although Legendary sued for damages, it

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[25] The briefs in this appeal include arguments on behalf of both LIG and LCC.

received no monetary recovery. An award of contractual attorney fees is an element of costs, not damages. (Civ. Code, § 1717; *Santisas, supra,* 17 Cal.4th at pp. 606-607; *Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 Cal.App.3d 699, 702.) Attorney fees as costs do not constitute a monetary recovery for purposes of Code of Civil Procedure section 1032, subdivision (a)(4).

DB NPI's complaint was not dismissed in its entirety. Accordingly, Legendary was not a defendant in whose favor a dismissal was entered. Similarly, DB NPI prevailed on the declaratory relief claim concerning the *EWB* action settlement proceeds; and Legendary was not "a defendant where neither plaintiff nor defendant obtains any relief." DB NPI also prevailed on Legendary's cross-complaint.

Without an automatic prevailing party, the trial court was charged with exercising its discretion first to determine the prevailing party and then to "allow costs or not." (Code Civ. Proc., § 1032, subd. (a)(4.); see also *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1249 ["The statute requires the trial court to determine which party is prevailing and then exercise its discretion in awarding costs"].) The trial court properly acknowledged this responsibility: "As a threshold matter, the Court must determine which party is the prevailing party for costs purposes.

Instead of exercising its discretion to declare Legendary or DB NPI as the prevailing party, the trial court skipped that step and went directly to ordering the parties to bear their own costs. A failure to exercise discretion to designate a prevailing party itself constitutes an abuse of discretion. (*Gray, supra,* 155 Cal.App.4th at p. 515.) Although trial courts have the discretion to determine that no party prevailed on a contract for the purpose of awarding attorney fees, that is not an option pursuant to Code of Civil Procedure section 1032, subdivision (a)(4).

The error warrants reversal only if it results in a miscarriage of justice. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1395; see also Cal. Const., art. VI, § 13.) Legendary does not claim prejudice or a miscarriage of justice, and we find none. Although the trial court improperly omitted the first step and did not identify a prevailing party, it properly exercised its discretion to order

each side to bear its own costs. Even if the trial court determined Legendary was the prevailing party, an order that the parties bear their own costs would have been appropriate.[26]

DISPOSITION

The judgment is affirmed. The postjudgment order in appeal no. B271089, awarding LIG $2,435,315.50 in attorney fees is reversed in part. LIG is entitled to attorney fees of $1,528,446.90 and has the option to pursue an additional $906,868.60 in attorney fees, as identified in DB NPI's exhibit C, and as outlined in this opinion. Otherwise, the postjudgment orders in appeal no. B271089 are affirmed. The postjudgment order in appeal no. B277203 is affirmed.

T.D. is awarded costs on appeal. In the interest of justice, DB NPI and LIG are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

DUNNING, J.*

We concur:

MANELLA, P. J. COLLINS, J.

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*Retired Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[26] For this reason, it is not necessary to discuss Legendary's contention that the trial judge, in designating Legendary as the prevailing party on the contract, also designated Legendary as the prevailing party in the action. The latter issue was not before the trial court when it ruled on Legendary's motion for an award of contractual attorney fees. (See, e.g., *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456.) A finding by Judge Rosenblatt that LIG prevailed in the action would not have affected Judge Sotelo's discretion to order the parties to bear their own costs.